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No. 98-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DIAL SERVICE INTERNATIONAL, INC.,
DIAL SERVICE COMPANY, LTD.
and YURI KONNO,

Petitioners,

vs.

CHARLES D. KIM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari represents the fourth, and, it is expected, final attempt by petitioners Dial Service Company, Ltd. ("DSC"), a Japanese company, Dial Service International, Inc. ("DSI"), its New York subsidiary, and Yuri Konno ("Konno"), the owner of the two companies (collectively "petitioners"), to overturn the jury's determination that they discriminated against and fired respondent Charles D. Kim ("respondent" or "Kim") because of his Korean race.[1]

In this petition, petitioners make the same factbound arguments, dressed up to give an appearance of legal moment, that were properly and repeatedly rejected by the jury and lower courts. Furthermore, petitioners' sweeping assertions of conflicts among the Court of Appeals on these issues are grossly exaggerated. Finally, petitioners' arguments on both the mixed motives charge and the Fifth Amendment were waived below. In sum, there is no sound basis for the Court to review this case and the petition should be denied.

A. The Petition Misrepresents the Evidence of Discrimination Warranting a Mixed Motives Jury Instruction.

Petitioners misrepresent the evidence of discrimination that the lower courts considered in approving a mixed motives jury instruction. The petition reads as if the record below contained only a single item of evidence that demonstrated bias, the Fort Lee memorandum, whereas, in fact, there is extensive evidence

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1. Previously, petitioners unsuccessfully filed post-trial motions for judgment as a matter of law and new trial with the United States District Court (Apdx B-13); an appeal of the District Court judgment to the Court of Appeals for the Second Circuit (Apdx A-1); and a petition for *rehearing in banc* (Apdx A-11).

directly reflecting petitioners' anti-Korean animus. Moreover, petitioners' description of the Fort Lee memorandum is unreliable.

Petitioners do not dispute that the memorandum authored by DSC General Manager Shohei Ito reflects the anti-Korean attitudes of a high level company official. Rather, petitioners argue that the memorandum is without import because Ito had "no responsibility for any of the employment decisions challenged by Kim as discriminatory conduct." (Pet. 3) This statement is simply not true. The Second Circuit and the District Court both determined that evidence "was adduced at trial that tended to show that Ito was a 'decisionmaker' for purposes of the actions upon which plaintiff's claims of discrimination are based." (Apdx A-9)[2]

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2. The District Court, in overruling petitioners' objection to the admission of the Ito memorandum and Konno's cover letter forwarding the memorandum, stated:

> I am conscious of the fact that this [Ito's memorandum] was prepared by a high-level executive [Ito], that is, the second document [Konno's cover letter], and sent by another high level executive [Konno], who is also a defendant individually in this case, and asks for a response in the context of normal business functions.
>
> *Both of these individuals, Ms. Konno and Mr. Ito, made decisions and executed decisions regarding the plaintiff's employment during the time that he was working for DSI,* and therefore it is highly relevant and under [Fed. R. Civ. P.] 403 I believe that it is appropriate to receive the document.

(Transcript ("Tr.") 297) (emphasis added).

Petitioners also misleadingly suggest that Konno's sole involvement with the memorandum was receiving it from Ito. This is not true. As both lower courts specifically found, Konno, upon receiving the racially tainted memorandum, forwarded it without qualification to the President of DSI for his consideration. (Apdx A-9; Tr. 297) Konno's actions lent legitimacy to the racist viewpoints set forth in the memorandum, and showed, at the very least, that she tolerated such prejudice.

As noted by the Second Circuit in its Summary Order (Apdx A-9), the Fort Lee memorandum was one of a number of evidentiary items directly reflecting DSC officials' prejudice against Koreans. Those other items, missing from petitioners' discussion, include:

- Seven months before she fired Kim, Konno issued a ban on DSI's use of Korean vendors. She declared, "Don't use Korean limousine service. Don't use Korean attorney. Don't use Korean CPA. . . . This is a Japanese company and we have to use Japanese people." (Joint Appendix ("JA") A-143) In furtherance of this policy, DSI stopped using a car service because it had Korean drivers[3], DSI fired the Korean Kim, and immediately thereafter, DSI replaced a Korean accountant, about whom no one had complained, with a Japanese accountant.

- A high level DSC official opposed using Kim's choice for an accountant solely because the accountant was Korean. Mr. Uetake, the former president of DSI, testified that DSC's head of accounting told him, "Well, Mr. Kim is Korean. So he [the head of

3. Konno had complained that the Korean drivers smelled like kimshi, a traditional Korean food with a garlicky taste.

accounting] ask me strongly not to use a Korean accountant." (JA A-240)

- Konno showed distaste for Kim's speaking Korean at DSI's office. Konno testified at her deposition that nearly all of DSI's Japanese employees had complained about Kim speaking Korean at the office, and that they found his use of Korean "unpleasant" and that it made them "uneasy." (JA at 444-52) The record shows Konno's testimony to be fabricated. None of the DSI employees who testified at trial, including those Konno identified as having made complaints, stated that they had complained about Kim speaking Korean. Konno's false testimony reflected her own prejudices and fears about Koreans.

- Petitioners treated Kim in a disparate manner from similarly situated non-Korean employees. Kim, as DSI's vice president and treasurer in charge of finance, accounting, general affairs and personnel, was paid significantly less than all other DSI vice-presidents, each of whom was Japanese. Kim was paid $53,000 a year and did not receive a raise for five years. By contrast, during the same five year period, DSI's three Japanese vice presidents earned annual salaries of $85,000, $60,000 and $60,000 respectively, and lower level Japanese employees received raises.

Kim also proved that the reasons petitioners gave at trial for his discharge were false and a pretext for discrimination. President Konno, defendants' spokesperson at trial, testified that she fired Kim for financial and work performance reasons. The sum total of Konno's testimony was:

Q. . . . Ms. Konno, would you tell the jury why you fired Mr. Charles Kim.

A. The most important reason, the main reason was economic reason.

Q. Were there other reasons also?

A. I'm not satisfied with his performance.

(JA A-275) Konno offered no further explanation or supporting evidence for her conclusory statements.

By contrast, Kim presented detailed evidence showing Konno's explanation to be false. As to the purported financial necessity of Kim's removal, the evidence pointed in the exact opposite direction. For the two years leading up to his discharge, 1994 and 1995, Kim, then DSI's sole officer, was instrumental in turning a profit for the company for the first time in its history. In addition, whereas petitioners failed to produce evidence of Kim's allegedly inadequate work performance, Mr. Uetake, former DSI president, testified that Kim's job performance was "excellent." (JA A-244) Kim put in longer hours than anyone else at DSI; assumed numerous job responsibilities outside of his formal job description; improved DSI's finances; was liked and respected by his co-workers; and received commendations for his dedication and work. (JA A-133-42; 223-25)

The District Court's post-trial order succinctly summarized the evidence:

> The jury could find, based on the evidence, that the defendants discriminated against the plaintiff throughout his employment: by hiring him at a salary below what a Japanese employee would have been

> paid and by firing him when they would not have fired a Japanese employee. Ms. Konno's testimony about her reasons for firing the plaintiff were so brief and conclusory that they were almost cryptic. Indeed, the defendants did not develop their argument that they terminated the plaintiff's employment due to their own economic exigencies or the plaintiff's poor performance. *As a result, the jury was justified in believing that racial animus informed decisions about the plaintiff's employment at every step.*

(Apdx B-36) (emphasis added).

B. The Petition Misrepresents The Facts Surrounding the Fifth Amendment Issue.

Petitioners' discussion of the facts surrounding the Fifth Amendment issue is incomplete and misleading. Petitioners' charge that Kim, by refusing to answer seven questions at trial on Fifth Amendment grounds, deprived them of an opportunity to develop their unclean hands or "after acquired evidence" defense [4] is unsupported by the record and conflicts with the District Court's finding.

At his deposition, Kim fully answered questions about petitioners' irregular accounting practices, and his role in the operation. Among other things, Kim testified about DSI's

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4. The District Court's Opinion and Order fairly summarized the evidence concerning petitioners' unclean hands or after-acquired evidence defense that Kim had allegedly defrauded the company. (*See* Apdx B-24-25) The jury was instructed on petitioners' unclean hands defense, but, as indicated by their verdict for respondent in excess of $1.5 million, rejected it.

practice of converting checks made out to third parties into cash, depositing the checks into a cash account and paying vendors and undocumented Japanese employees with proceeds from the cash account. At his deposition, Kim asserted the Fifth Amendment only when asked whether he had forged endorsements on certain checks.

On the basis of Kim's limited invocation of the Fifth Amendment at his deposition, petitioners, in a pretrial motion *in limine*, sought to preclude him from offering any testimony whatsoever that would dispute petitioners' accusation that Kim had defrauded the company. When at trial, Kim testified that DSC and DSI officials authorized the questionable accounting practices, petitioners renewed their objection.

The District Court denied petitioners' request, explaining that Kim's assertion of the Fifth Amendment at his deposition was confined to specific questions about his endorsement of checks:

> [I]t seems to me that the line that was drawn, insofar as I could discern it from the attachments to the defendant's supplemental pretrial memorandum of law and motion in limine, was that the Fifth Amendment was taken as to endorsements on the back of checks and the actual payments, or transfer of cash, to the quote/unquote, illegal workers. And it was not taken with respect to someone like [DSI President] Mr. Uetake's knowledge about the use of the cash account, the writing of such checks, the existence of this whole practice or procedure.

(JA A-153-54) Thus, the court permitted Kim to testify as to the defendants' knowledge of the irregular accounting practices.

Kim was subjected to an exhaustive cross-examination (*see* Tr. 395-646), much of it devoted to trying to show that Kim had defrauded petitioners. With the exception of seven questions, Kim answered all of petitioners' questions. As to the seven questions, Kim narrowly invoked the Fifth Amendment when asked whether he had forged endorsements on checks. (JA A-166-68; 188-91; 209) At the trial, petitioners did not object to Kim's assertion of the Fifth Amendment, and specifically did not contend that Kim had waived the privilege by testifying on direct examination about the same subject matter. (*Id.*) After each invocation of the privilege, the District Court instructed the jury that they could draw an adverse inference. (*Id.*) In its charge to the jury, the District Court reiterated the adverse inference instruction. (Apdx B 48-49, n.8) Petitioners did not object to the adverse inference instruction during the cross-examination or at the charging conference.

REASONS FOR DENYING THE WRIT

I.

THE FIRST QUESTION PRESENTED WAS NOT PRESERVED BELOW.

Petitioner failed to preserve for appeal the question whether there was sufficient evidence of discrimination to warrant a mixed motives charge. A party who fails to object to a jury instruction at trial waives the right to make the instruction the basis for an appeal. Fed. R. Civ. P. 51; *Springfield Massachusetts v. Kibbe*, 480 U.S. 257, 258 (1987). This rule is designed to allow a trial court to have an adequate opportunity to cure any defects in the instructions before sending the jury to deliberate. *Metromedia Co. v. Fugazy*, 983 F.2d 350, 363 (2d Cir. 1992), *cert. denied*, 508 U.S. 592 (1993) (citing 9 C.

Wright & A. Miller, Federal Practice and Procedure § 2551 (1971), at 623); *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1068-69 (1st Cir. 1990).

In this case, the parties were provided two opportunities to take exceptions to the jury charge, once on the fifth day of trial at the close of all the evidence, and again on the morning of the sixth day of trial before the jury was charged. On both of these occasions, defense counsel used the opportunity to raise exceptions with the court. At no time, however, did defense counsel object to the inclusion of a mixed motives charge. Therefore this objection was waived.

The only objection made by petitioners to the mixed motives charge was contained in their Response to Plaintiff's Pretrial Memorandum of Law. However, petitioners' pretrial memorandum, submitted before the District Court had an opportunity to consider the evidence of discrimination adduced at the trial, did not cure their failure to make a timely objection. *See Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1373 (9th Cir. 1979) (" 'The trial court is not required to rummage through trial briefs and proposed instructions in an effort to discover potential objections to instructions not yet given or formulated' ") (quoting *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir. 1960)); *Caruso v. Forslund*, 47 F.3d 27, 31 (2d Cir. 1995) (plaintiff could not circumvent Fed. R. Civ. P. 51 by relying on her pretrial submission of proposed jury instructions).

A timely objection at trial would not have been futile. Prior to the commencement of the trial, the District Court had not ruled on petitioners' mixed motives objection set forth in their Pretrial Memorandum of Law. In the absence of a categorical ruling rejecting petitioners' pre-trial position on the mixed motives charge, there is no reason to believe a trial objection would have been a mere formality. *See Fogarty v. Near North*

Ins. Brokerage, Inc., 1998 U.S. App. LEXIS 30519 (2d Cir. December 1, 1998) (unless court's rejection of prior objection to jury instruction is sufficiently categorical, party must object at trial to preserve issue for appeal); *cf. Ginett v. Computer Task Group, Inc.*, 11 F.3d 359, 360 (2d Cir. 1993) (trial objection to jury instruction unnecessary to preserve issue for appeal where court had "flatly rejected" plaintiff's proposition set forth in a motion *in limine*).[5]

II.

PETITIONERS DID NOT PRESERVE THE SECOND QUESTION FOR APPEAL.

The petition's second proposed question, regarding Kim's Fifth Amendment rights, was not considered by the Second Circuit. Specifically, petitioners are challenging District Court rulings that they never appealed to the Court of Appeals. Therefore, the petitioners' proposed second question was not preserved for appeal.

Petitioners' proposed question consists of challenges to three separate District Court rulings. Petitioners contend that: one, the District Court abused its discretion by allowing Kim to testify on direct examination concerning a matter that he allegedly refused to testify about on Fifth Amendment grounds at his deposition; two, the District Court abused its discretion by allowing Kim to invoke the Fifth Amendment on cross-examination about matters that he had allegedly testified about on direct examination; and three, the District Court abused its discretion by issuing an adverse inference instruction as a remedy for Kim's refusal on cross-examination to answer the questions on Fifth Amendment grounds, rather than imposing a stricter sanction. (*See* Pet. 25)

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5. In fact, the District Court modified other proposed instructions in response to petitioners' objections. (*See, e.g.*, Tr. 925-26; 995 (burden of proof in pretext charge))

However, petitioners' Statement of Issue submitted to the Second Circuit was significantly narrower than the question presented to this Court:

> Whether the district court committed reversible error by allowing plaintiff to testify concerning matters about which he could not be cross-examined because he invoked the Fifth Amendment?

(Brief For Appellants Dial Service International, Inc., Dial Service Company, Ltd. and Yuri Konno at 2) The point heading in petitioners' Second Circuit brief similarly reads:

> The District Court Committed Reversible Error By Permitting Kim To Invoke The Fifth Amendment As a Shield To Prevent Cross-Examination On Matters Similar To Those He Brought Out On Direct Examination

(*Id.* at 59)[6]

Thus, the issue considered by the Court of Appeals was confined to the second prong of the question now presented to this Court. The appeal below did not include a challenge to the District Court's decision to allow Kim to testify on direct

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6. In the text of their Second Circuit brief, petitioners likewise limited their challenge to the District Court's decision allowing Kim to invoke the Fifth Amendment on cross-examination:

> The district court committed reversible error by permitting Kim to invoke the Fifth Amendment on cross-examination after he testified on direct examination as to defendants' alleged knowledge of the fraudulently endorsed check.

(*Id.* at 61).

examination concerning a matter about which he allegedly refused to testify at his deposition. Petitioners also did not argue to the Second Circuit, as they wish to argue to this Court, that the District Court erred in not imposing a sanction more severe than an adverse inference instruction. The Court should decline to review a question not raised before the Court of Appeals. *See Kibbe*, 480 U.S. at 258.

As to the one issue actually presented to the Second Circuit, the propriety of Kim's invocation of the Fifth Amendment on cross-examination, that question also is not properly before the Court. As noted, petitioner never objected at trial to Kim's assertion of the privilege upon cross-examination. (*See supra* at p. 8) Petitioners never argued to the District Court that Kim waived his Fifth Amendment rights by testifying on direct. Thus, petitioners did not preserve the second proposed question for review because they failed to submit the question, in substantial part, to the Court of Appeals, and neglected to make a timely objection at trial to the only part of the question raised before the Second Circuit.

III.

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THERE WAS SUFFICIENT EVIDENCE TO WARRANT A MIXED MOTIVES CHARGE.

Notwithstanding petitioners' failure to make a timely objection to the mixed motives charge, the Court of Appeals considered the question and held that the District Court did not err in issuing the instruction:

> [W]e do not believe that the court erred in issuing a "mixed motives" instruction. Such an instruction is warranted where, *inter alia*, there is "evidence of statements or actions by decisionmakers that may be viewed as directly reflecting the alleged

> discriminatory attitude." *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997) (internal quotation marks and citation omitted). Among the direct evidence presented in this case was a memorandum written by DSC General Manager Shohei Ito, and forwarded to the then-President of DSI by Konno, which made a disparaging remark about Koreans. Testimony was adduced at trial that tended to show that Ito was a "decisionmaker" for purposes of the actions upon which plaintiff's claims of discrimination are based. Under these circumstances, we cannot say that the court erred by giving a "mixed motives" instruction.

(Apdx A-9).

It is clear that under the standard articulated by the Second Circuit in this and other cases, *see, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997); *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992), Kim presented sufficient evidence of discrimination (*see supra* at pp. 2-6) to justify a mixed motives charge. Petitioners do not dispute that Kim met the Second Circuit's mixed motives standard, but argue, in essence, that the standard is flawed. The Court should reject this argument. The standard employed by the Second Circuit is consistent with the approach followed by the majority of circuit courts interpreting *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In *Price Waterhouse*, the Court held that a plaintiff could prevail in a case in which the employer had lawful as well as unlawful motives for its actions, so long as the employer could not prove that it would have taken the same action if it had been motivated solely by lawful considerations. The plurality described the Court's holding:

> We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.

Id. at 258.

Under *Price Waterhouse*, the mixed motives analysis is applied only when the plaintiff proves the discrimination "played a motivating part in an employment decision." *Id.* The Court found that this requirement was satisfied by circumstantial evidence of discrimination presented by the plaintiff in that case, because the evidence was enough to "show that the employer actually relied on her gender in making its decision." *Id.* at 251.

The plurality did not refer expressly to "direct evidence" in discussing the quantum of evidence necessary to trigger the mixed motives analysis. However, in requiring that a plaintiff show that an impermissible motive played a "motivating part in an adverse employment decision," the plurality made clear that the evidence of discrimination must be more substantial than what is needed to make out a *prima facie* case under the pretext analysis. *Id.* at 250, 252, 258. Justice O'Connor's concurrence emphasized the strong degree of proof needed to shift the burden of persuasion to the defendant:

> . . . the plaintiff must show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status.

Id. at 277.

A majority of circuit courts, including the Second Circuit, have held that *Price Waterhouse* does not bar a plaintiff from using circumstantial or inferential evidence to shift the burden of persuasion; however, the evidence of discrimination must go beyond the simple *prima facie* showing needed to invoke *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998) (direct evidence, warranting a mixed motives charge, interpreted as conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision); *Thomas v. National Football Players Ass'n*, 131 F.3d 198, 205 (D.C. Cir. 1997) (burden of persuasion shifts under *Price Waterhouse* when the plaintiff has shown any sufficiently probative direct or indirect evidence that unlawful discrimination was a substantial factor in the employment decision); *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997) (remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if the evidence stops short of a virtual admission of illegality); *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 750 (1st Cir. 1996) (stating that it was unnecessary to "essay fine distinctions" on the quantity of proof required to support a mixed motives analysis, adding that the shift in the burden of persuasion invariably depends upon a plaintiff's ability to produce evidence of the employer's discriminatory motive for the adverse job action beyond the *prima facie* showing needed to invoke *McDonnell Douglas*); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (requiring evidence of conduct or statements both that reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision); *Griffiths v. CIGNA Corp.*, 988 F.2d 457,

470 (3d Cir. 1993) (circumstantial evidence is sufficient if it "ties directly to" discriminatory animus), *cert. denied*, 510 U.S. 865 (1993); *Ostrowski*, 968 F.2d at 182 (*Price Waterhouse* charge appropriate where plaintiff presents nonstatistical evidence directly tied to the forbidden animus, for example policy documents or statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus).

Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998), which petitioners contend is "identical" in pertinent respects to the instant case, is readily distinguishable. (Pet. 21-22) In *Walden*, the Third Circuit held that a memorandum reflecting a retaliatory animus did not trigger a mixed motives charge where there was no evidence linking its author to the decision to fire the plaintiff. At most, the plaintiff could show that the decisionmaker had received the memorandum. By contrast, in this case, there is a clear linkage between the prejudiced memorandum and the decisionmakers who fired Kim. As both lower courts observed, Ito, the author of the memorandum, was a decisionmaker. (*See supra* at p. 2) Moreover, unlike the *Walden* decisionmaker, Konno, by forwarding Ito's memorandum to DSI's President for his review, took actions that may be viewed as showing that she shared, or at least tolerated, Ito's anti-Korean sentiments. *See Barbano v. Madison Cty. Bd. of Supervisors*, 922 F.2d 139, 143-44 (2d Cir. 1990) (finding decisionmaker's knowing toleration of discriminatory statements by other officials to constitute evidence of discrimination).

Petitioners' claim that the circuit courts are in "glaring and untenable conflict" about *Price Waterhouse* (Pet. 19) is highly exaggerated. *See Thomas*, 131 F.3d at 204 (surveying the law of other circuits and finding that the majority of the circuits considering the mixed motives doctrine reached a similar

conclusion to the D.C. Circuit). As to the "multiple pleas" for guidance from the Court on this issue (Pet. 22-23), the petition cites exactly two student law review notes.

This would be a singularly poor case for the Court to select for clarifying any confusion in the *Price Waterhouse* standard. Kim presented strong evidence of discrimination, whether analyzed under the mixed motives or pretext method of proof. Kim proved that petitioners' explanation for his discharge was a sham. (*See supra* at pp. 5-6) Kim also presented compelling evidence of disparate treatment, such as a racially-based pay scale (*see supra* at p. 4), which while by itself may not have warranted a *Price Waterhouse* charge, in conjunction with other evidence of pretext and discrimination, would have satisfied his ultimate burden of persuasion under the pretext analysis. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Thus, the outcome of this case would have been unchanged had the District Court not given the mixed motives charge.

IV.

THE DISTRICT COURT'S ADVERSE INFERENCE INSTRUCTION PROPERLY ACCOMMODATED KIM'S FIFTH AMENDMENT RIGHTS WHILE PREVENTING UNFAIRNESS TO PETITIONERS.

The District Court did not abuse its discretion when, in response to respondent's invocation of the Fifth Amendment, it gave the jury an adverse inference instruction, rather than imposing a more drastic sanction. The District Court's remedy fairly balanced Kim's privilege against self-incrimination and petitioners' interest in presenting evidence in support of their case.

Petitioners' suggestion that there is confusion or conflict among the lower courts regarding this area of the law is dubious.

The law regarding a witness' invocation of the Fifth Amendment in a civil case is well settled. The Fifth Amendment "guarantees . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and *to suffer no penalty . . . for such silence.*" *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (underlining added; italics in original; citation omitted). Thus, the Supreme Court has prohibited "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Id.*; *see also Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280, 284-85 (1968); *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

"Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994). Further, the court "should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege." *United States v. Certain Real Property and Premises Known As: 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78, 84 (2d Cir. 1995).

The District Court has broad discretion to fashion a remedy to avert prejudice to the party that may result from the opposing party's invocation of the Fifth Amendment. *Certain Real Property*, 55 F.3d at 84-85. So long as the trial court considers relevant factors and acts with moderation to accommodate both a litigant's valid Fifth Amendment interests and the fairness interests of the opposing party, the nature and extent of that accommodation should be left primarily to the District Court's discretion. *See id.*; *United States v. United States Currency*, 626 F.2d 11, 16 (1st Cir. 1980) (stating that the district court is in a better position to know what means will best accommodate

all interests); *Wehling v. Columbia Broadcasting Syst.*, 608 F.2d 1084 (5th Cir. 1979).

Petitioners' argument that the District Court abused its discretion in not imposing a more serious sanction than an adverse inference instruction is premised on the false proposition that Kim abused the Fifth Amendment. The lower courts never found that Kim abused the discovery process or the Fifth Amendment. In the absence of a finding of abuse by the lower courts, petitioners are left hoping that this Court will embark on its own fact-finding — an unlikely outcome.

Defendants' further argument that Kim invoked the Fifth Amendment on cross-examination about the same issue to which he testified on direct examination also is erroneous. (Pet. 26) On cross-examination, Kim declined to testify about the narrow question of whether he forged certain check endorsements. However, he did not testify about these endorsements in his direct testimony. During defendants' cross-examination, Kim did not invoke the Fifth Amendment regarding any other issue and answered all other questions about his involvement in DSC's and DSI's irregular accounting practices.

The District Court's adverse inference instruction properly accommodated both parties' interests. Since the jury was instructed that it could draw an adverse inference from Kim's refusal to answer petitioners' questions about the check endorsements, it is difficult to decipher how petitioners were prejudiced by the court's ruling. Petitioners were not precluded from presenting other evidence that check endorsements were forged, if such evidence existed. Petitioners were not precluded from arguing to the jury that the check endorsements were forged. Moreover, petitioners were not precluded from presenting evidence that the irregular accounting practices were unauthorized; indeed President Konno testified to that effect. Petitioners cannot explain how they were

prejudiced by the court's ruling except that they were unable to extract an admission from Kim on the narrow question of sixteen check endorsements. Thus, petitioners' claim that the court's ruling was an abuse of discretion is thoroughly unsupported.

The cases cited by petitioners on this issue are factually so far afield from the instant case that they are not instructive. For instance, in the two First Circuit cases discussed in the petition, *Serafino v. Hasbro, Inc.*, 82 F.3d 515 (1st Cir. 1996), and *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989), the District Court struck the witnesses' trial testimony because, at their depositions, they asserted the Fifth Amendment over a wide range of matters, preventing the opposing party from carrying out an effective investigation of their case. Here, by contrast, Kim at his deposition invoked the Fifth Amendment regarding a single narrow question. In *Serafino* and *Cartagena*, the district courts determined that the witnesses' assertion of the privilege impaired the opposing parties' ability to put on their case; here, the District Court made no such finding.

In sum, the District Court properly exercised its discretion when it allowed Kim to assert the privilege and gave an adverse inference instruction, and petitioners have failed to show good cause for disturbing the decision.

CONCLUSION

There is no basis for this Court to review the Second Circuit's decision. The petition should be denied.

Respectfully submitted,

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